

Memo

To: Planning & Zoning Commission
From: Lee Veness, Assistant City Attorney
CC: Janis Hampton, City Attorney
Date: May 15, 2008
Re: Adult Entertainment Text Amendment To Chapter 130

I. Introduction

The purpose of this memo to the Planning and Zoning Commission is to present and seek approval for a proposed amendment to Bryan Code of Ordinances, Section 130-3, "Definitions", so as to amend the definition of the term "adult entertainment" and to amend Section 130-2 "Purpose" to provide for a specific purpose for these amendments and legislative findings to support these amendments as well as for ratification of the placement of "adult entertainment" uses in the current classification under Industrial District. Due to recent changes in law, as well as the need to update the current definitions for adult entertainment under Section 130-3, this ordinance has been proposed to amend these definitions and to provide for specific findings with respect to the adoption of these changes. "Adult entertainment" or sexually oriented businesses have had a long history of litigation in federal court over first amendment issues. Under these proposed changes, the content of the speech is not the concern, but rather the negative secondary effects of such businesses on the community and adjacent neighborhoods.

More specifically the provisions of this proposed ordinance are intended:

- (a) To protect and enhance the livability of the city;
- (b) To encourage the stabilization of property and property values;
- (c) To ensure the harmonious, orderly and efficient growth and development of the City; and,
- (d) To regulate the use of property under the general zoning powers of a home rule city and under applicable Texas statutory law which authorizes home rule cities to divide cities into districts and regulate the use of property within the districts for the purpose of promotion of the health, safety and morals of the public, and for the protection of the general welfare of the community. They have been made with reasonable consideration, among other things, for the character of the district, and its suitability and compatibility for the particular uses specified; and with a view to conserving the value of buildings and neighborhoods, and encouraging the most appropriate use of land throughout the city. The provisions of this chapter are designed and intended to minimize the adverse or

negative secondary effects of adult uses on the community. The provisions of this chapter have neither the purpose nor the effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent or effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

II. Definition changes to Section 130-3 of the Code of Ordinances for “adult entertainment”

The current code provisions under definitions for adult entertainment provide the following:

Adult entertainment shall mean those land uses involved in providing entertainment to a person or persons as defined by the following:

(1) *Adult bookstore* shall mean an establishment that has a substantial portion of its stock-in-trade and offers for sale any one or more of the following:

- a. Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, videocassettes, slides, or other visual representations that are characterized by an emphasis upon the depiction or description of specified sexual activities; or
- b. Instruments, devices, or paraphernalia that are designed for use in connection with specified sexual activities.

(2) *Adult bar* shall mean a nightclub, bar, restaurant, or similar establishment that regularly features live performances such as dancing that is characterized by the exposure of any portion of the human form other than the pubic region. Display of the pubic region, buttocks, or human genitals is not permitted.

(3) *Adult theater* shall mean an establishment where films, motion pictures, videocassettes, slides, or other photographic reproductions are presented in which a substantial portion of the total presentation time is devoted to the showing of material characterized by an emphasis on the depiction or description of specified sexual activities, or specified anatomical areas.

Under the proposed ordinance, these provisions would be amended to read as follows:

Adult entertainment shall mean those land uses involved in providing entertainment or amusement to a person or persons as defined by the following:

ADULT ENTERTAINMENT means separately or any combination of, an adult arcade, adult bookstore, adult cabaret, adult escort agency, adult massage establishment, adult motel, adult movie theater, adult novelty store, adult service establishment, adult video store, sex parlor, sexual encounter center, or nude modeling studio as defined in this Chapter. “Adult entertainment” also includes any other commercial enterprise, that has as a primary business purpose of offering of a service or the selling, renting or exhibiting of material, devices or any other items, intended to provide sexual stimulation or sexual gratification to its customers, and which material, devices or any other items is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or whose employees or customers appear in a state of nudity. The following definitions for purposes of clarification shall be applicable:

- (1) "primary business purpose", is defined to mean that a main purpose or major "drawing card" of the business, among other purposes, is providing sexual stimulation or gratification through the offering of a service or the selling, renting or exhibiting of material, devices or any other items intended to provide sexual stimulation or sexual gratification to its customers and which material, devices or any other items is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or whose employees or customers appear in a state of nudity, but is not intended to include businesses whose entire activities might only be an incidental cause of sexual stimulation or gratification, and whose activities do not involve nudity nor material, devices or any other items distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, with "incidental cause" defined as happening as a chance or undesigned feature of something else; random; not of prime concern; subordinate to; or, as in accidentally cause. "A primary business purpose" of providing sexual stimulation or gratification may be demonstrated by the presence of one or more of the following factors and terms:

(a) The exclusion of minors, persons under the age of 18 years, from the establishment or premises of the building by law or by option of the establishment, due to in part or in whole, to the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or whose employees or customers appear in a state of nudity; or,

(b) The exclusion of minors, persons under the age of 18 years, from any portion of the overall floor space of premises containing merchandise displayed for sale and open to customers, excluding restrooms, by law or by option of the establishment, due to in part or in whole, to the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or whose employees or customers appear in a state of nudity; or,

(c) The visibility, prominence or accessibility to customers of material distinguished by or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas; or,

(d) A significant or substantial portion of the retail sales or revenue, the retail value of inventory, amount of retail floor space, amount of display areas or the amount of inventory attributable to or composed of material, services or products distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. ("Inventory" shall be measured with all titles or objects available on the premises for sale or rental including each of those items that are identical, or considered a separate title or object. "Significant or substantial portion" means more than an

insignificant or incidental portion, does not depend upon a specific percentage or ratio, and does not necessarily mean a majority or predominant amount);or,

(f). Any other fact, circumstance, or evidence which is relevant to demonstrate the type and quantity of merchandise or service that the establishment sells, rents, offers for sale or rent, displays or exhibits.

- (2) *Adult arcade* means any place to which the public is permitted or invited wherein coin-operated, token-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five (5) or fewer persons per machine at any one (1) time, and where the images so displayed are distinguished or characterized by an emphasis on matter depicting or describing specified sexual activities or specified anatomical areas.
- (3) *Adult bookstore* means a commercial establishment which as one of its primary business purposes, engages in the offering for sale or rental, for any form of consideration, any one or more of the following:
 - (a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe specified sexual activities or specified anatomical areas, intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas; or
 - (b) Instruments, devices including genital stimulation devices, or paraphernalia which are designed for use in connection with specified sexual activities. "Instruments, devices including genital stimulation devices, or paraphernalia which are designed for use in connection with specified sexual activities" does not include items used for birth control, for prevention of sexually transmitted diseases or any other such items available only by prescription from licensed pharmacies
- (4) *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment that has a primary business purpose of the offering to customers of live entertainment, that includes entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," which regularly features:
 - (a) Persons who appear in a state of nudity; or
 - (b) Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities", or
 - (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."; or
 - (d) That regularly features live performances such as dancing that is characterized by the exposure of any portion of the human form other than the pubic region.

- (5) *Adult massage establishment* means any establishment or agency which that has as one of its primary business purposes of giving massages for a fee or other consideration, at the establishment or on a home-call basis, that is not licensed or not operated within strict compliance with applicable statutory law and the regulatory rules promulgated by Texas Department of State Health Services, or other regulatory agency, with respect to all licensing requirements and rules of the State of Texas, and where employees engage in any form of specified sexual activities with customers.
- (6) *Adult motel* means a hotel, motel or similar commercial establishment which:
- (a) Offers accommodations to the public for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other pornographic reproductions which are distinguished or characterized by an emphasis on matters depicting or describing specified sexual activities or specified anatomical areas and has a sign visible from the public right-of-way which advertises the availability of this adult type of photographic reproductions; or
 - (b) Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or
 - (c) Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.
- (7) *Adult movie theater* means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, video reproductions, slides or other visual representations, or any combination thereof, are regularly shown which are distinguished or characterized by an emphasis on matters depicting or describing specified sexual activities or specified anatomical areas.
- (8) *Adult novelty store* means a commercial establishment which offers for sale or rental for any form of consideration, any one (1) or more of the following: Instruments, devices, including genital stimulation devices, or other paraphernalia which are designed or manufactured for use in connection with specified sexual activities regardless of the nature of any other products or services sold or provided, but not including items used for bona fide birth control or for prevention of sexually transmitted diseases, and not including any items available for purchase only by prescription from licensed pharmacies.
- (9) *Adult service establishment* means a commercial establishment which offers services or sells products to customers and in which one (1) or more of the employees or the customer appears in a state of nudity or simulated nudity.
- (10) *Adult video store* means a commercial establishment which as one of its primary business purposes, engages in the offering for sale or rental, for any form of consideration, any one or more of the following:
- (a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe specified sexual activities or specified anatomical areas, or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or

characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas; or

(b) Instruments, devices including genital stimulation devices, or paraphernalia which are designed for use in connection with specified sexual activities.

"Instruments, devices including genital stimulation devices, or paraphernalia which are designed for use in connection with specified sexual activities" does not include items used for birth control, for prevention of sexually transmitted diseases or any other such items available only by prescription from licensed pharmacies.

- (11) *Customer* means any person who:
- (a) Is allowed to enter a sexually oriented business in return for the payment of an admission fee or any other form of consideration or gratuity; or
 - (b) Enters a sexually oriented business and purchases, rents, or otherwise partakes of any merchandise, goods, entertainment, or other services offered therein; or
 - (c) Is a member of and on the premises of a sexually oriented business operating as a private club.
- (12) "*Distinguished by or characterized by an emphasis upon*" means the dominant or principal theme of the object referenced. For instance, when the phrase refers to films "which are distinguished or characterized by an emphasis upon the exhibition or display of specified sexual activities or specified anatomical areas" the films so described are those whose dominant or principal character and theme are the exhibition or display of "specified sexual activities" or "specified anatomical areas."
- (13) *Employee* means any person who renders any service whatsoever to the customers of a sexually oriented business or who works in or about a sexually oriented business and who receives compensation for such service or work from the operator or owner of the sexually oriented business or from its customers.
- (14) *Escort* means a person who, for consideration, agrees or offers to act as a companion or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.
- (15) *Escort agency* means a person or business association who, which as one of its primary business purposes, furnishes, offers to furnish, or advertises to furnish escorts, or any combination thereof, for a fee, tip, or other consideration.
- (16) "*Instruments, devices including genital stimulation devices, or paraphernalia which are designed for use in connection with specified sexual activities*" does not include items used for birth control, for prevention of sexually transmitted diseases or any other such items available only by prescription from licensed pharmacies
- (17) *Manager* means any person (1) who supervises, directs or manages any employee of a sexually oriented business or (2) who is charged by the licensee, owner, or operator with directly supervising the operation of the sexually oriented business and with monitoring and observing all areas of the enterprise to

which customers are admitted at all times during which the enterprise is open for business or customers are on the premises.

- (18) *Nude modeling studio* means any place where a person who appears in a state of nudity or displays specified anatomical areas is provided or allowed to be observed, sketched, drawn, painted, sculptured, photographed or similarly depicted by other persons who pay money or any form of consideration, except as may be provided for under Section 130-3, Definitions, *adult entertainment*, (31) *Exclusions*.
- (19) *Nudity or state of nudity* means less than completely and opaquely covered:
- (a) Human genitals, pubic region, or pubic hair;
 - (b) All portions of a female breast below a point immediately above the top of the areola continuing downward to the lowest portion of the breast;
 - (c) Human buttock; or
 - (d) Any combination of the above.
- (20) *Operated or causes to be operated* means to cause to function or to put or keep in operation. A person may be found to be operating or causing to be operated a sexually oriented business whether or not that person is an owner, part owner, licensee, or manager of the establishment.
- (21) *Person* means an individual, firm, association, organization, partnership, trust, foundation, company or corporation.
- (22) *Regularly* means featuring, promoting, performing, permitting, doing or advertising an event or other happening or occurrence on a recurring or routine basis involving any length of time.
- (23) *Premises* mean the building of the adult entertainment establishment.
- (24) *Sex parlor* means an establishment that is operated for the purpose of giving massages for a fee or other consideration at the establishment or on a home-call basis, that are intended to provide sexual stimulation, sexual gratification or engage in, in combination with a massage or other physical contact, including specified sexual activities.
- (25) *Sexual encounter center* means a business or commercial enterprise that offers for a fee or other consideration, any physical contact in the form of wrestling or tumbling between persons of the opposite sex, or specified sexual activities between male and female persons and/or persons of the same sex, or other activities when one (1) or more of the persons is in a state of nudity or simulated nudity.
- (26) *Simulated nudity* means a state of dress in which any device or covering is worn and exposed to view that simulates any part of the genitals, buttocks, anus, pubic region, or areola of the female breast.
- (27) *Specified anatomical areas* means:
- (a) The human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

(b) Less than completely and opaquely covered human genitals, public hair, buttocks, or a female breast below a point immediately above the top of the areola, or any combination thereof.


- (28) *Specified sexual activities* means any of the following:
- (a) The fondling or other erotic touching of another person's human genitals, pubic region, buttocks, anus, or female breasts; or
 - (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, bestiality or sodomy; or
 - (c) Excretory functions as part of, or in connection with, any of the activities set forth in (1) and 2, above.
- (30) *Sexual oriented business* means those businesses defined under the definition of "adult entertainment".
- (31). *Exclusions:* The term "*adult entertainment*" shall not be construed to mean or include:

(1) Any business activity or service that by federal or state law is required to operated by or employing licensed psychologists, licensed physical therapists, registered massage therapists, registered nurses, licensed pharmacists or licensed athletic trainers engaged in practicing such licensed professions as generally recognized within their profession, including

- a. A state-registered massage establishment that employs only state-registered massage therapists to perform massage therapy; conforming to all requirements of state law and other applicable law, or
- b. A state-registered massage school with at least two (2) registered massage therapists that teaches the course of instruction required for registration as a massage therapist or a school approved by the Central Education Agency or that is otherwise approved by the state; or
- c. A state-registered massage therapy instructor who instructs one (1) or more students in any section of the course of instruction required for registration as a massage therapist; or
- d. Operated by or employs a licensed physical therapist whose activities fall under the control of the Texas Board of Physical Therapy Examiners or a license of another state agency performing health care services within the scope of the applicable licensing act who performs the activities for or on behalf of the business commercial enterprise

(2) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts as its sole business;


(3) Any retail establishment whose principal business is the offering of wearing apparel for sale to customers, which does not exhibit merchandise on live models, and which does not offer for sale or rental any:

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- a. Materials of any kind containing depictions of specified anatomical areas; or
 - b. Instruments, devices, or paraphernalia which are designed or manufactured for use in connection with specified sexual activities; or
- (4) Any activity conducted or sponsored by any Texas independent school district, licensed or accredited private school, or public or private college or university; or,
- (5) Any legalization or authorization to violate any applicable law, civil or penal, duly enacted by any governmental body regarding any of the activities described in these definitions under the term 'adult entertainment'.

III. Amendments to Section 130-2, Purpose:

The current code provisions under Section 130-2 provide the following:

Sec. 130-2. Purpose.



The zoning regulations and districts as herein established have been made in accordance with adopted guiding principles for the purpose of promoting the health, safety, morals, and general welfare of the city. They have been designed to lessen the congestion in the streets; to secure safety from fire, panic, and other dangers; to ensure adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. They have been made with reasonable consideration, among other things, for the character of the district, and its suitability and compatibility for the particular uses specified; and with a view to conserving the value of buildings and neighborhoods, and encouraging the most appropriate use of land throughout the city.

(Code 1988, App. A, § 2; Ord. No. 1468, § 2, 4-27-2004)

Under the proposed amendment to the ordinance, Section 130-2 would be changed to read:

Sec. 130-2. Purpose.

(1) The zoning regulations and districts as herein established have been made in accordance with adopted guiding principles for the purpose of promoting the health, safety, morals, and general welfare of the city. They have been designed to lessen the congestion in the streets; to secure safety from fire, panic, and other dangers; to ensure adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. They have been made with reasonable consideration, among other things, for the character of the district, and its suitability and compatibility for the particular uses specified; and with a view to conserving the value of buildings and neighborhoods, and encouraging the most appropriate use of land throughout the city.

(Code 1988, App. A, § 2; Ord. No. 1468, § 2, 4-27-2004)

(2) In addition to the purpose set out immediately above in Sec 130-2, the city council makes the following specific findings regarding purpose and legislative facts with respect to the definition of "adult entertainment" contained in Sec 130-3 Definitions,

(a) *Purpose.* It is the purpose of this definition of "adult entertainment" and the related definitions contained under the definition of "adult entertainment" to regulate the use of property under the general zoning powers of a home rule city and under applicable Texas statutory law which authorizes home rule cities to divide cities into districts and regulate the use of property within the districts for the purpose of promotion of the health, safety and morals of the public, and for the protection of the general welfare of the community. They have been made with reasonable consideration, among other things, for the character of the district, and its suitability and compatibility for the particular uses specified; and with a view to conserving the value of buildings and neighborhoods, and encouraging the most appropriate use of land throughout the city. The provisions of this chapter are designed and intended to minimize the adverse secondary effects of adult uses on the community. The provisions of this chapter have neither the purpose nor the effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent or the effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this Ordinance to condone or legitimize any activity that may be illegal under other applicable law.

(b) It is the intent of the city council that the locational regulations of this chapter within the city's unified development code are promulgated pursuant to V.T.C.A., Local Government Code § 243.001 et seq., as it applies to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the City Charter and V.T.C.A., Local Government Code § 211 et seq. and other applicable law.

(c) *Findings.* Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the city council, and on findings incorporated in the cases of *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986); *FW/PBS, Inc. v. city of Dallas*, 493 U.S. 215 (1990); *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *H and A Land Properties v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), including the studies referenced in these cases, such as in *H and A Land Properties v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007) which contains and references studies in other communities, the city council finds that:

(1) Legislative Finding Number 1: The city council finds that V.T.C.A., Local Government Code § 211, et seq., authorized home rule cities to divide cities into districts and regulate the use of property within the districts for the purpose of promotion of the health, safety and morals of the public, and for the protection of the general welfare of the community.

(2) Legislative Finding Number 2: The city council finds that V.T.C.A., Local Government Code § 211, et seq., authorized home rule cities to promulgate and enforce all ordinances necessary to protect health, life and property of the public, and to preserve the good government, order and security of such cities and their inhabitants.

(3) Legislative Finding Number 3: The city council finds that V.T.C.A., Local Government Code § 243, et seq., where the Texas legislature found that the unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to the decline of residential and business neighborhoods and the growth of criminal activity, and provided that does not diminish the authority of a local government to regulate

sexually oriented businesses with regard to any matters, recognizes the negative secondary effects of such businesses.

(4) Legislative Finding Number 4: V.T.C.A., Local Government Code, § 215.004 authorized home rule cities to enforce all ordinances necessary to protect health, life, and property, and to preserve the good government, order and security of such cities and their inhabitants.

(5) Legislative Finding Number 5: The city council finds that studies conducted in other cities and states throughout the country have shown a decline in neighborhoods and neighborhood-oriented commercial, religious, and institutional facilities when exposed to sexually oriented or adult entertainment businesses as a negative secondary effect, and the result would not differ in the City of Bryan

(6) Legislative Finding Number 6: The city council finds that the Supreme Court of the United States and the Fifth Circuit for the United States Court of Appeals have upheld the validity of such controls that locate these kinds of activities within zoning districts that are less sensitive to their blighting influences and other negative secondary influences.

(7) Legislative Finding Number 7: The city council finds, based upon the experiences of the cities in Texas and elsewhere in the country, that adult entertainment establishments are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature.

(8) Legislative Finding Number 8: The city council further finds, based upon the experiences of the cities in Texas and elsewhere in the country, that police departments of various communities have made a substantial number of arrests for sexually related crimes in adult entertainment establishments.

(8) Legislative Finding Number 8: The city council finds that "adult entertainment" businesses, due to their very nature, have serious objectionable operational characteristics, thereby contributing to urban blight and downgrading the quality of life in adjacent areas.

(9) Legislative Finding Number 9: The city council finds that there is convincing documentary evidence that sexually oriented businesses or adult entertainment as to be defined under the Bryan Code, because of their very nature, have deleterious secondary effects on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the consequent downgrading of property values. Numerous studies, reports, and findings concerning the harmful effect of adult entertainment uses on surrounding land uses and neighborhoods have been produced. One such example that has been presented to and considered by the city council is the opinion of the Fifth Circuit for the United States Court of Appeals in *H and A Land Properties v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), and the two studies approved by the Fifth Circuit as being evidence regarding the negative secondary effects of the sale of materials for off-site use, (1) "Adult Entertainment Business in Indianapolis" by Department of Metropolitan Development on Indianapolis (1984) and (2) the "Adult Entertainment Business in City of Oklahoma City", by the Community Development Department of Oklahoma City, in 1986, which have been also presented to and considered by the City Council, as well as various documentary evidence filed in the lower court in Cause Number Civil Action No. 4:05-CV-166-A, in the Northern District of Texas, Fort Worth Division, including the opinions, reports and affidavits of (i) Connie B. Cooper, FAICP, -Expert Report; (ii) Expert Report of Richard McClearly PhD.; (iii) report to the City Attorney on Crime Related Secondary Effects, prepared by Richard McClearly; (iv) the summary of the study performed by April

Virnig, dated July 3, 2003, for the City of Kennedale, which reference and describe certain studies such as:

- a. Those studies noted and approved in *H and A Land Properties v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), including two studies for sale of materials for of-site use (1) "Adult Entertainment Business in Indianapolis" by Department of Metropolitan Development on Indianapolis (1984) and (2) The City of Oklahoma City, by the Community Development Department in 1986. The Indianapolis survey, conducted by the City of Indianapolis in conjunction with Indiana University School of Business, Division of Research, polled 20% of the national membership of the American Institute of Real Estate Appraisers. Eighty percent of the respondents predicted that an adult bookstore would negatively impact residential property values, and seventy-two percent believed commercial property value would also be negatively impacted. The Oklahoma City study, which surveyed one hundred Oklahoma City real estate appraisers, produced similar results: Seventy-four percent predicted a negative impact on real estate value in the surrounding area.
- b. Amarillo, Texas. In 1977, the Amarillo Planning Department prepared a report entitled, "A Report on Entertainment Uses in Amarillo." The report concluded that adult entertainment uses have adverse impacts on surrounding land uses, and that those impacts can be distinguished from those of other businesses. The study found that street crime rates were considerably above the city's average in those areas immediately surrounding the adult-only businesses, and that late at night, during their primary operating hours, those businesses create unique problems of noise, glare, and traffic.
- c. Los Angeles, California. A November, 1986 report, "The Current Status of Pornography and Its Effect on Society," prepared by the Los Angeles Police Department's Vice Division, noted [that] the overwhelming increase in prostitution, robberies, assaults, thefts, and proportionate growth in police personnel deployed throughout Hollywood are all representative of the blighting effect of adult entertainment establishments on the entire community.
- d. Indianapolis, Indiana. In 1984, Indianapolis surveyed real estate experts on the impact that adult entertainment uses had on surrounding property values. A random sample (twenty (20) per cent) of the national membership of the American Institute of Real Estate appraisers was used. The opinion survey found that an adult bookstore located in the hypothetical neighborhood described would have a negative impact on residential property values of premises located within one (1) block of the site.
- e. Phoenix, Arizona. A 1979 planning department study compared three (3) study areas containing adult entertainment uses with three (3) control areas that had similar demographic and land use characteristics but no adult entertainment businesses. The study indicated that, on the average, "in the three (3) study areas, property crimes were thirty-six (36) per cent higher, violent crimes were four (4) per cent higher, and sex crimes were over six hundred (600) per cent higher than in the control areas."
- f. St. Paul, Minnesota. In 1987, the planning department of St. Paul completed a study entitled "Effect of Surrounding Area of Adult Entertainment Businesses." The study concluded that:
 1. There was a statistically significant correlation between neighborhood deterioration as reflected in housing values and crime rates and the location of adult entertainment businesses;
 2. The statistical relationship was still significant after taking into account certain marketing factors; and

3. There was a stronger correlation with neighborhood deterioration after establishment of an adult entertainment business than before.

g. Seattle, Washington. In 1976, the City of Seattle amended its zoning ordinance providing for the gradual elimination of nonconforming adult theaters. In a memorandum to the city planning commission from the planning department, proposed zoning ordinance amendments were recommended based on the evidence that neighborhood property values would be negatively impacted and that residents feared that some of the people attracted by adult theaters could constitute a threat to the comfort and safety of the residents. Evidence was presented in the report which indicated that adult theaters were not compatible with adjacent residences and other types of uses, such as churches, schools, etc.

h. Austin, Texas. In May, 1986, the Austin Planning Department published a report on adult businesses in Austin. An analysis of crime rates in Austin was conducted by comparing areas with adult businesses to areas without adult businesses. Four (4) study areas were chosen that did not contain adult businesses. Two (2) study areas were chosen containing only one (1) adult business each, and two (2) study areas were chosen containing two (2) adult businesses each.

Within those study areas containing adult businesses, sex crimes were found to be from two (2) to nearly five (5) times the city-wide average. Also, sex-related crime rates were found to be sixty-six (66) per cent higher in study areas containing two (2) adult businesses as compared to study areas containing only one (1) adult business.

Austin conducted a survey of one hundred twenty (120) real estate appraisers and lending institutions. Eighty-eight (88) per cent of those responding indicated a belief that an adult bookstore would decrease residential property values within one (1) block, and fifty-nine (59) per cent felt that residential property values would decrease within three (3) blocks.

A survey of three (3) adult businesses in Austin revealed that only three (3) customers had addresses within one (1) mile of an adult business and forty-four (44) per cent of all customers visiting the three (3) adult businesses had addresses outside the City of Austin.

i. Detroit, Michigan. The Detroit Adult Entertainment Use Regulations were adopted in 1972 as part of an "anti skid row ordinance" which prohibited an adult entertainment business within five hundred (500) feet of a residential area or within one thousand (1,000) feet of any two (2) other regulated uses. The term "regulated use" applied to a variety of other sexual entertainment establishments, including adult theaters, adult bookstores, cabarets, bars, taxi dance halls, and hotels. During the hearing on the ordinance, the city introduced extensive documentation that demonstrated the adverse socio-economic and blighting impact which adult entertainment uses have on surrounding development. The documentation consisted of reports and affidavits from sociologists, urban planners, and real estate experts, as well as from laymen on the cycle of decay expected in Detroit from the influx and concentration of such establishments.

(10) Legislative Finding Number 9: The city council is relying on the findings and studies listed above and is attempting to benefit the public welfare by proposing, examining and adopting zoning rules, definitions and provisions related to adult entertainment.

(a) It is the express intent of the city council to ensure that the adverse effects created by "adult entertainment" are minimized and controlled so as not to cause or contribute to crime, increased blighting, or downgrading of adjacent property and the surrounding neighborhood.

(b) The regulations established herein are intended to protect and preserve the quality, property values, integrity and character of the city's neighborhoods and commercial districts, deter the spread of urban blights, and protect the citizens of the city from the objectionable effects of sexually oriented businesses.

(11) Legislative Finding Number 11: The city council finds, from the studies that have been presented, that, because of their very nature, adult entertainment uses can and should be relegated to nonresidential and non-retail zoning districts.

(12) Legislative Finding Number 12:

- (a) The city council finds, based on the purposes and legislative findings set out in this ordinance and from the studies noted in Legislative Finding Number 5, that adult entertainment uses should be placed in Sec. 130-23. I, Industrial District as currently provided in the Bryan Code of Ordinances. The city council finds that there will be adequate locations for 'adult entertainment' within the city in the area zoned Industrial for those uses already permitted in that district, and will not unreasonably limit alternative avenues of communication, while minimizing the adverse secondary effects of adult entertainment and providing the other purposes noted herein. There will be a sufficient number of sites provided by placing dispersed sites for "adult entertainment" in the Industrial District. The Industrial district composes approximately [____%] of the area in the City of Bryan that is not zoned for residential types or agricultural types of uses, and the areas inside those designated as Industrial District, are already served by Bryan infrastructure with respect to utilities, streets and other services, or such infrastructure is readily available. The relevant portion of Sec. 130-23(b) already currently provides such use, and the relevant specifications as follows are hereby affirmed and ratified under these findings:

Sec. 130-23. I, Industrial District.

(a) *General purpose and description.* The I, Industrial District is intended primarily for the conduct of manufacturing, assembling and fabrication, and for warehousing, wholesaling and service operations which may depend upon frequent customer or client visits. Such uses do require accessibility to major highways, rail lines or other means of transportation requiring the distribution of goods.

(b) *Permitted uses.*

Accessory/incidental uses to the main use;

Adult entertainment;

- (b) Further, the city council finds, based on the purposes and legislative findings set out in Sec 130-2 herein and from the studies noted in Legislative Finding Number 5, that there will be a sufficient number of sites provided by requiring dispersed sites for "adult entertainment" under Sec. 130-23, (g) (3), where these uses shall not be located within 1,000 feet of a public school, public hospital, church, or residential district, and adult entertainment uses shall not be located within 1,000 feet of another adult entertainment use, so as to allow for sufficient dispersal of such sites to prevent concentrations, thereby minimizing the adverse secondary effects, while not unreasonably limiting alternative avenues of communication, and providing the other purposes noted herein. The relevant portion of Sec. 130-239(g)(3) already currently provides such requirements, and the relevant specifications as follows are hereby affirmed under these findings:

Sec. 130-23,

(g) *Other regulations.*

- (1) As established by all other applicable sections and/or ordinances.

- (2) Incidental living quarters for employees required by job duties to remain on the site for limited periods are permitted. Such quarters shall be provided in permanent structures that are an integral part of the use associated permitted in this district.
- (3) Adult entertainment uses permitted in this district shall not be located within 1,000 feet of a public school, public hospital, church, or residential district. The distance shall be measured from the front (main) door of the adult entertainment establishment to the front (main) door of a school, hospital, or church, or to a residential district boundary. Adult entertainment uses shall not be located within 1,000 feet of another adult entertainment use. The distance shall be measured from the front (main) door of the adult entertainment establishment to the front (main) door of another adult entertainment establishment.
- (4) Establishments selling alcoholic beverages shall not be located within 300 feet of a public school, church, or a public hospital. The distance shall be measured as specified in the City Code.
- (5) Where activity has ceased for one or more years on a property where the most recent land use is a permitted use in this district, a site plan shall be filed in accordance with the provisions of nonresidential and multifamily development, article III of chapter 62, before activity on the property may resume. Single-family dwellings, patio homes, townhouses, and duplexes are exempt from this provision.
- (6) No temporary structures, such as recreational vehicles, travel trailers, construction trailers, or mobile homes may be used for on-site dwelling purposes.
- (7) Wireless telecommunication facilities shall be allowed only as provided for in section 130-35